attached to the gift. The gift was completed at the formal presentation, and the arrangement for the grand-father to continue living there was made subsequently.

The learned trial judge found as a fact that the gift was complete, and I can see no reason for differing from this finding. I would accordingly dismiss this appeal with costs, the deposit in Court to be paid to the respondent towards her costs.

Sir Charles Murray-Aynsley, C.J. (S.) : — These proceedings arose out of the alleged gift of a wooden house. In this Court there were two matters for consideration. First, whether the house was a fixture which formed part of the realty, second, whether there was a perfect gift.

On the first point, I consider that there is a settled custom in this country that houses of this type are regarded as personalty in which ownership may be separate from ownership of the soil. I do not know of any judicial authority on the matter, but, in the course of the fifteen years that I have been in the country I have always found that this custom was accepted. I think that effect should be given to this custom to the exclusion of the English law of fixtures.

On the second point I think that the matter should be approached from the standpoint of English law. I believe that Moslem law on the subject is the same as English law. The facts show that the donor made a verbal gift of the house to the respondent some twenty years ago. The respondent would have then been about fifteen years of age. The donor continued to live in the house until his death about a year ago. At first the respondent lived there with the donor. On her marriage she left the house. The respondent and three other persons gave evidence about the alleged gift. It appears from the evidence of two out of the three that the gift was to take effect on the death of the donor. Even if the evidence of the respondent is accepted entirely (and it is difficult that a grand-father would divest himself of his home in favour of a young girl and depend for the rest of his life on her good nature to have a roof over his head), I consider that without any transmutation of possession there is not a complete gift under English law. If this is the case the only question is whether it is advisable to introduce this part of English law into Kedah. The question may appear very technical, but is is very easy to produce evidence of a gift of this kind and usually impossible to produce evidence to the contrary. I think, therefore, that the rule would be of utility.

I would allow the appeal.

Spenser Wilkinson, J. : — I have had the opportunity of reading the judgment of the learned President and I agree with his conclusions.

In my view the evidence indicates that the whole object of what was described by the witnesses as a "pronouncement" was a formal ceremony of gift intended to constitute constructive delivery of possession. It is not easy to see what form an actual delivery of possession from one inhabitant of a house to another could take, especially of a house which probably has no key, and it seems to me what that the parties in this case adopted the device of a formal pronouncement.

The additional evidence that the deceased said he would live in the house until his death and that his grand-daughter could then remove the house is to my mind consistent with the deceased having, after the gift, disclosed in general conversation that these were his private arrangement with his grand-daughter regarding what was now her house. The statement in the evidence made by the plaintiff that she took possession then and there is entirely uncontradicted, and I see no reason why the learned Judge should not have accepted it, as in fact he did.

I agree, therefore, that the gift was complete and that the appeal should be dismissed with costs.

Appeal dismissed.

The Firm of C. K. JOSHI v. The INDIAN OVERSEAS BANK LTD.

[O.C.J. (Spenser-Wilkinson, J.) March 20, 1953]

[Penang — Civil Suit No. 116 of 1952]

Procedure — Application to stay proceedings which are vexatious or oppressive or an abuse of the powers of the Court — Burden of proof.

In this case the defendants applied for further proceedings in the action to be stayed on the ground that the bringing of the action in Penang was vexatious and oppressive.

Held: it was for the defendants to show that it would be unjust for the questions raised in the suit to be determined in Penang and as they had failed to do so, the application must be refused.

CIVIL SUIT.

Ong Huck Lim (*Sonni Pillai* with him) for the plaintiffs.

E. A. de Buriatte for the defendants.

The facts appear sufficiently from the interlocutory judgment below.

Spenser Wilkinson, J. : — This was a Summons-in-Chambers, taken out by the defendants, applying

that all further proceedings in the action be stayed on the ground that the bringing of the action in Penang is vexatious and oppressive. The application was adjourned into Open Court for argument.

In making this application the defendants were relying upon the inherent jurisdiction of the Court to stay any proceedings which are vexatious and oppressive or an abuse of the process of the Court. The extent of this jurisdiction is very clearly set out in *Dicey's* Conflict of Laws, 6th edition, page 316 as Rule 52, which reads as follows :—

> "52. The court has jurisdiction to interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceeding, or to restrain the institution or continuation of proceedings or enforcement of judgments in foreign courts.
>
> But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive."

The plaintiffs in this action claim the return of moneys received by the defendants' Head Office in Madras from the Director-General of Munitions Productions in India in Payment of the value of 1,118 ingots of tin requisitioned in the early part of 1942. This tin had been shipped in Penang by the plaintiffs on board the steamer s.s. "Heinrich Jessen", which had to leave the port rather hurriedly on account of a bombing attack by the Japanese with the result that no Mate's Receipt or Bill of Lading was issued at the time, so that the tin arrived in Calcutta without any shipping documents. As a result of various negotiations in India which resulted in India which resulted in the signing of various letters of guarantee the money was paid to the defendant Bank on various dates between the 22nd June and the 28th December, 1942.

Immediately prior to the outbreak of war in Malaya the plaintiffs had been indebted to the defendants' Branch in Penang in the sum of $88,771.12 on overdraft account. One of the letters written to the Bank at Madras by C. K. Joshi on the 7th December, 1942 contained the following paragraph :—

> "We shall be glad if you will kindly arrange to pay the consignees the profit allowed on the consignment less your expenses and interest and retain the balance with you to be credited to the Overdraft Account of our firm with your Penang Branch."

As I understand it, it is one of the contentions of the defendants that as a result of the arrangements then made of which this letter is some evidence the overdraft of the plaintiffs with the Penang Branch was then and there satisfied by setting off a sufficient amount of the money received for the tin against that overdraft, although at the time its exact amount was not known in India.

The defendants, therefore, contend that as these negotiations took place in India, C. K. Joshi himself being at that time in India all the evidence relating to this transaction is in India, so that the effect of the action being tried in Penang will be not only that the defendants will have to spend a very large sum of money in bringing witnesses to Penang and maintaining them here but also that they will be highly inconvenienced in many ways by the action being tried in Penang to an extent which will work an injustice to them.

The defendants further contend that all these transactions having been made in India and the contract having been performed in India all the questions to be decided will be governed by Indian law and if the action is tried in Penang it will be necessary to go to the extent of proving the Indian law applicable to the subject.

Finally it is submitted that as Mr. C. K. Joshi the principal witness of the plaintiffs is also in India it will be no hardship or inconvenience or injustice to the plaintiffs if the proceedings be taken in India.

Whether or not, if this action stood alone, the defendant would have made out a sufficient case to induce the Court to exercise its discretion and stay the action it is not necessary for me to decide, for this action does not stand alone but is intimately connected with certain former proceedings. On the 29th March, 1950 the present defendants applied by Originating Motion to the High Court in Penang for an Order that the time within which the applicants might apply under the Japanese Judgments and Civil Proceedings Ordinance, 1946 to set aside a Japanese decree dated the 21st January, 1944 might be extended. The decree in question was a judgment whereby the present defendants recovered judgment against the present plaintiffs for the sum of $98,069.44 being the amount of the overdraft of the firm C. K. Joshi with the defendant Bank on current account. The amount of this judgment was paid in full by the present plaintiffs to the Bank.

No very active steps were taken in the Originating Motion above referred to, but on the 22nd September, 1950 the defendants issued a Specially Endorsed Writ of Summons against the firm of C. K. Joshi in which they claimed to set aside the Japanese judgment just referred to; a declaration that the sum of $88,771.12 paid by the defendants to the plaintiffs during the Japanese occupation in respect of a judgment debt fell to be revalued under the Debtor and Creditor

(Occupation Period) Ordinance; payment of the pre-war debt so revalued; and a declaration that the Bankers' lien against the plaintiffs in respect of the defendants' pre-war indebtedness was valid and subsisting.

When the present defendants, who were the plaintiffs came to file their Statement of Claim in that Suit the prayer was somewhat different to the relief asked for in the Specially Endorsed Writ. The second prayer in the Statement of Claim filed on the 22nd January, 1951 reads as follows :—

"2. A declaration that the pre-war overdraft of the defendants with the plaintiffs' Penang Branch was settled in India on receipt by the plaintiffs of the said sum of Rupees 235,490-2-3 or sufficient part thereof."

It is to be noted that this, though perhaps not quite the same, is very much like the contention which Mr. de Buriatte for the defendants in the present case says ought to be adjudicated upon in India.

A Defence was duly filed in Suit No. 310 of 1950 and on the 14th May, 1952 the action came on for trial. At the trial the then plaintiffs (that is to say the defendant Bank) sought leave to discontinue the action with liberty to bring a fresh action. For the reasons given in my Grounds of Decision dated the 19th May, 1952 that application was not acceded to and the Bank's action was dismissed with costs.

Civil Suit No. 310 of 1950 having thus been disposed of adversely to the Bank on the 30th May, 1952 the Originating Motion asking for extended time within which to set aside the Japanese decree was withdrawn.

The position, therefore, is that the present defendants themselves brought an action in the Japanese Courts to recover the amount of C. K. Joshi's pre-war overdraft, obtained judgment for the amount and received full payment therefor; the Bank's post-war applications to set aside that Japanese judgement have been abortive; and the very claim or one very much like it which they propose to set up as a defence in the present action was part of their own claim in an action which they themselves brought in Penang.

Among the reasons given for the Bank's failure to proceed with the Civil Suit No. 310 of 1950 were that owing to certain decisions of the Courts here the claim for revaluation of the Japanese judgment debt could not be maintained, and that it was doubtful if an application to set aside the Japanese decree could be made by means of an action. Whether these reasons were good or bad no reason was given for not proceeding with the claim contained in the Statement of Claim that the pre-war overdraft was settled in India, or alternatively, that the Bankers' lien against the plaintiffs in respect of the overdraft was still valid and subsisting. If the defendants' position then was that Penang was an inconvenient place to try these issues then the day of the trial was hardly the appropriate time to raise the matter; and the point was certainly not raised at any earlier stage of these proceedings.

I do not think it is necessary to deal in detail with the various authorities cited to me; the result of them is, I think, admirably summarised in *Dicey's* Conflict of Laws at page 317 as follows :—

"(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.

(2) In order to justify a stay two conditions must be satisfied, on positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plantiff. In both the burden of proof is on the defendant."

In my opinion the defendants in the present action having themselves at an earlier date chosen Penang as the forum for the decision of questions substantially the same as those which they seek to raise in the present action cannot with any success contend now that it would be unjust for those questions to be determined in Penang in the present action.

I do not accept, moreover, that the issues in the present action would be confined to the question of the negotiations in India. If the defendant Bank ever obtained a lien upon the tin in question it must, I think, have been obtained in Penang, and this is a matter which can be solved only by evidence at this end.

As to the question of the applicability of Indian law, I am of opinion that it will be far easier to ascertain here what the law of contract in India is in view of the fact that the Contract Ordinance of the Federation is in substance the Indian Contract Act than for the Indian Courts to ascertain the very complicated law laid down by the various Ordinances comprising what has been called a statutory scheme for dealing with the various difficulties arising from the Japanese occupation.

For these reasons I do not think that this is a case where in my discretion I ought to interfere with the plaintiffs' right of access to the Queen's Courts and I must, therefore, refuse the application with costs.

Application refused.